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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

IN RE: CAPITAL CITY PRESS AND JOE GYAN,
Petitioners.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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58 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment require that a content-based restriction on post-verdict interviews of former jurors be subject to a prior restraint standard of review, or at a minimum, a strict scrutiny standard of review, and, if so, does a district court's restriction that prohibits post-verdict juror interviews concerning any aspect of the jury's "deliberations" satisfy either standard?

2. Does the First Amendment permit a district court to restrain the press from interviewing former jurors concerning their "deliberations" in a federal criminal case if the court leaves the former jurors themselves wholly free to discuss all aspects of their service, including their deliberations, "on their own initiative"?

3. Is a district court's order restricting post-verdict interviews of former jurors, addressed to jurors by the court at the time of their discharge, that states "I also instruct you that, absent a special order by me, no juror may be interviewed by anyone concerning the deliberations of the jury", unconstitutionally vague because it fails to elaborate on the meaning of the terms "deliberations" and "interviewed" and fails to advise jurors that the order does not prohibit them from speaking "on their own initiative"?

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the United States Court of Appeals for the Fifth Circuit:

1. Capital City Press*
2. Joe Gyan
3. The Times-Picayune Publishing Corporation
4. Michael Perlstein
5. Reporters Committee for Freedom of the Press (*amicus curiae*)
6. The Freedom of Information Foundation of Texas, Inc. (*amicus curiae*)
7. The Society of Professional Journalists (*amicus-curiae*)
8. The American Society of Newspaper Editors (*amicus curiae*)

Neither the United States of America nor any of the criminal defendants appeared before the Court of Appeals. The following is a list of those parties:

1. The United States of America
2. Carl W. Cleveland
3. Fred H. Goodson
4. Maria F. Goodson
5. Larry S. Bankston
6. Benjamin Bura Rayburn
7. Joe H. Morgan

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* Capital City Press, a petitioner herein, has no parent corporation and no nonwholly owned subsidiaries.

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OPINIONS BELOW

The decision of the United States District Court for the Eastern District of Louisiana is not reported, but is published at 25 Media L. Rep. 2139 (E.D. La. July 22, 1997), and is included in the Appendix ("App.") hereto. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 128 F.3d 267 (CA5 1997) and is included in the Appendix.

JURISDICTION

The judgment of the Fifth Circuit affirming the decision of the District Court was entered on October 29, 1997. On November 12, 1997, the petitioners filed a timely Suggestion for Rehearing *En Banc*. In conformity with the Fifth Circuit's Internal Operating Procedure following Fed. R. App. P. 35, the Suggestion for Rehearing *En Banc* also was treated as a petition for rehearing by the panel. On November 25, 1997, the Fifth Circuit denied the petition for rehearing by the panel and the Suggestion for

Rehearing *En Banc*. App. at 21a. This Petition for a Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

Fifth Amendment, United States Constitution:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

A. Preliminary Statement

This petition presents important issues relating to the scope of First Amendment protection for core speech relating to the conduct of government, specifically, the functioning of the criminal justice system. The Fifth Circuit has affirmed a district court order categorically and perpetually prohibiting the petitioners and other news organizations, unless they obtain the district court's prior permission, from conducting post-verdict interviews of former jurors regarding any aspect of the jury's "deliberations" in a federal criminal trial. The Fifth Circuit's decision is contrary to First Amendment precedent of this Court and conflicts with the decisions of other Courts of Appeals that have treated orders forbidding post-verdict juror interviews as unconstitutional prior restraints. Post-verdict juror interviews in the Fifth Circuit are now subject to content-based restrictions that do not apply anywhere else in the nation.

Remarkably, the Fifth Circuit affirmed the order at issue in part because the order imposes no restrictions whatsoever on jurors who wish to speak "on their own initiative" about any aspect of their jury service. Thus, although the order directly restrains the press, jurors re-

main free to publicize any portion of their deliberations, including the votes and comments of other jurors during deliberations which may be disclosed without the consent of those other jurors.

The Fifth Circuit's decision is contrary to clear First Amendment precedent of this Court, and presents to this Court a timely and important question of broad application. Accordingly, the Court should grant certiorari to review the Fifth Circuit's decision.

B. Statement of Facts

This First Amendment litigation arose from the federal criminal prosecution of six defendants, including two former Louisiana State Senators, who were prosecuted for racketeering and related offenses in connection with alleged efforts to corrupt the handling of video poker legislation in the Louisiana Legislature. *United States v. Cleveland*, Cr. No. 96-207 (E.D. La.). The defendants' trial began in May of 1997 and lasted six weeks. The jury deliberated for eight days before returning its verdicts on June 27, 1997. The jury convicted four defendants, including former State Senator Larry Bankston, on some counts and acquitted them on others, but acquitted two defendants, including former State Senator B.B. "Sixty" Rayburn, on all counts.

Just before the District Court discharged the jurors on June 27, it addressed them in open court. During that address, the District Court issued the following order (the "June 27 Order"):

> I now instruct you that you have no obligation to speak to any person about this case. *I also instruct you that, absent a special order by me, no juror may be interviewed by anyone concerning the deliberations of the jury.* I also instruct you that the lawyers and the parties are not to attempt to question you without an order from me. App. at 19a (emphasis added).

The District Court entered this order *sua sponte*, without notice to affected news organizations, without conducting a hearing, without making any supportive findings of fact and without elaborating on the meaning of the terms "deliberations" or "interviewed" or the intended scope of the order generally.

C. Procedural History

The petitioners are Capital City Press, which publishes *The* (Baton Rouge) *Advocate*, and Joe Gyan, a reporter for that daily newspaper (collectively, the "Petitioners").[1] On July 15, 1997, the Petitioners filed with the District Court a Motion to Intervene[2] and a Motion to Modify the June 27 Order. The Petitioners argued that the June 27 Order was vague, in particular, that without elaboration from the court, each juror might interpret the order as barring discussion of his or her own "deliberations" (*i.e.*, thinking) about the case, as distinguished from the comments and votes of jurors during the eight days of formal deliberations that preceded the verdicts. The Petitioners also argued that, even if the June 27 Order were not vague, its prohibition on voluntary juror interviews, and its requirement that any party desiring to conduct an interview first seek a "special order" from the District Court, were contrary to the First Amendment. Neither

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[1] In the District Court and the Court of Appeals, the Times-Picayune Publishing Corporation and a reporter for *The Times-Picayune* also appeared as intervenors and then as appellants.

[2] The Motion to Intervene was filed and granted pursuant to the right of the press and public to be heard on a case-by-case basis with respect to matters affecting their First Amendment right to be informed of the operations of the judiciary. *See Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596 (1982). *See also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (news organizations permitted to intervene in criminal case to contest order closing the trial); *United States v. Antar*, 38 F.3d 1348 (CA3 1994) (news media organization permitted to intervene in criminal case to contest district court orders restricting post-verdict juror interviews).

the United States nor any of the criminal defendants opposed, or took any position on, the Petitioners' motions.

Without holding a hearing, on July 22, 1997, the District Court issued an opinion and order granting the Motion to Intervene but denying the Motion to Modify in its entirety. App. at 8a. The District Court determined that, despite its total prohibition on interviews concerning "deliberations", the June 27 Order was "narrowly tailored". In addition, although the District Court devoted several pages of its opinion to explaining what the court meant by "deliberations", the District Court also concluded that the June 27 Order was not vague. The District Court then undertook to elaborate on the intended scope of the June 27 Order:

> [Petitioners] contend that the specific boundaries of what is meant by "jury deliberations" is unclear. The Court disagrees. *Black's Law Dictionary* defines "deliberation" in the context of jury function as the "analy[sis], discussi[on], and weighing [of] evidence" "within the secrecy of the jury room" "with a view to reaching a verdict based upon law applicable to [the] facts of [the] case as they find them to be." *Black's Law Dictionary* 427 (6th ed. 1990). Moreover, common sense dictates that "jury deliberations" *cover the entire process* by which jurors arrive at their verdict. This *includes* what was said and done by the jurors in the privacy of the jury room in the process of reaching the verdict in this case. App. at 16a (emphasis added).

Thus, the District Court extended the reach of "deliberations" to "the entire process by which jurors arrive at their verdict" and stated that, in its view, that process "includes"—but is not limited to—what transpires in the jury room.

On July 31, 1997, the Petitioners filed a Motion for Expedited Appeal and Alternative Petition for Writ of Mandamus in the Court of Appeals accompanied by a

full merits brief.[3] The Motion for Expedited Appeal was granted. App. at 20a. On October 6, 1997, the case was argued before a panel consisting of Judges Garwood, Duhe, and DeMoss. Neither the District Court nor any party to the underlying criminal case made an appearance, filed a brief or argued.

On October 29, 1997, in an opinion written by Judge DeMoss, the Fifth Circuit panel affirmed the one-sentence June 27 Order. The Fifth Circuit quoted the standard established by its own prior decision in *In re The Express-News Corp.*, 695 F.2d 807 (CA5 1982) (Rubin, J.):

> [A] court rule cannot . . . restrict the journalistic right to gather news unless it is narrowly tailored to prevent a substantial threat to the administration of justice. App. at 3a.[4]

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[3] On September 23, 1997, the Reporters Committee for Freedom of the Press, The Freedom of Information Foundation of Texas, Inc., The Society of Professional Journalists and The American Society of Newspaper Editors filed an *amicus* brief in support of reversal.

[4] As the quoted standard indicates, the Fifth Circuit in *Express-News* adopted a framework for evaluating restrictions on post-verdict juror interviews that is strongly protective of First Amendment rights and establishes a presumption that broadly defined prohibitions on post-verdict interviews, such as the one at issue here, are unconstitutional. *See Davis v. East Baton Rouge Parish School Bd.*, 78 F.3d 920, 929 (CA5 1996) (confirming that *Express-News* requires strict scrutiny analysis). The restriction struck down in *Express-News* was virtually identical to the one upheld by the Fifth Circuit in this case. In *Express-News*, the Fifth Circuit emphasized that:

> The judiciary, like the legislative and judicial branches, is an agency of democratic government. The public has no less a right under the first amendment to receive information about the operation of the nation's courts than it has to know how other governmental agencies work and to receive other ideas and information. 695 F.2d at 809.

The Fifth Circuit held, however, that this "strict standard" must be "tempered" by the need to protect jury deliberations from untoward disclosure since:

> Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. App. at 6a, *quoting Clark v. United States*, 289 U.S. 1, 13 (1933) (Cardozo, J.).

Applying this "tempered" version of the strict *Express-News* standard, the Court of Appeals determined that the June 27 Order was "narrowly tailored to prevent a substantial threat to the administration of justice—namely, the threat presented to free speech within the jury room by the possibility of post-verdict interviews". App. at 6a. The Court of Appeals reached this conclusion despite the fact that the order barred interviews with willing (as well as unwilling) jurors and foreclosed all inquiry about deliberations, not just specific questions about the votes or comments of jurors who might choose not to speak. The court determined that a total prohibition on deliberation-related interviews was justified solely because "there was a great amount of media coverage of the trial from start to finish". App. at 4a. According to the Fifth Circuit:

> This factor justifies the imposition of the order entered in this case without regard to the willingness of the jurors to be interviewed or the civility of the reporters seeking to conduct interviews. App. at 4a.

In contrast to the District Court's statement that its own order extended to "the entire process by which jurors arrive at their verdict", the Court of Appeals held that the June 27 Order did not foreclose questions about a juror's "general reactions" and that the order's prohibition extended "only to the discussions about the case occurring among jurors within the sanctity of the jury room". App. at 5a.

The Fifth Circuit then addressed itself to another fundamental issue relating to the scope of the June 27 Order—determining exactly whose speech was restricted by the order. Without explanation, the Court of Appeals determined that the June 27 Order restricted only the Petitioners' *seeking* information about the jury's deliberations, and did not:

> purport to prevent jurors from speaking out on their own initiative. . . . A juror who wishes to do so may make a statement. App. at 5a.

The Court of Appeals cited this disparity as a further indication that the June 27 Order was "narrowly tailored". The court did not explain how an order that muzzled the Petitioners but left jurors free to speak "on their own initiative" could be effective in preventing the supposed threat to candor within the jury room. Nor did the Fifth Circuit explain how a ban so broad as to forbid interviews of willing jurors about their own votes and comments could be "narrowly tailored" if the goal of the ban was to reassure jurors that their jury-room confidences would not be disclosed against their will.

Finally, the Court of Appeals rejected the Petitioners' contention that the June 27 Order was vague because it did not define "deliberations" and left jurors to wonder whether interviews about their own thoughts, impressions and reactions were off-limits. The court dismissed this contention as "semantical gymnastics . . . distinctions that only a lawyer would appreciate". App. at 6a-7a. The court explained:

> The term "deliberations of the jury" may not be a paragon of definiteness and precise meaning. . . . The term does, however, bring an immediate image to mind: the members of a jury in the jury room discussing and debating . . . to reach a verdict. We hold that the term "jury deliberations" is sufficiently definite . . . and does not realistically threaten First

> Amendment protected communication. . . . App. at 7a.

The court affirmed the June 27 Order precisely as given. It did not require that its own clarification of the order as permitting "general reaction" interviews and limiting the definition of "deliberations" to formal jury-room discussions be included in a post-verdict jury instruction. Nor did the court address the apparent conflict between its own definition of "deliberations" and that advanced by the District Court in its July 22 opinion (the "entire process" by which jurors reach a verdict). In addition, the Court of Appeals did not discuss whether the June 27 Order was unconstitutionally vague in failing to specify that the order was directed only to would-be interviewers but not (as the court held) to former jurors themselves. In particular, the court did not address how lay jurors might be expected to understand that they themselves were not restricted from speaking even though the June 27 Order was directed specifically to the jurors, not the press, with no accompanying explanation;[5] was both preceded and followed by other instructions specifically addressed to the jury;[6] and presumably was delivered by a judge facing and speaking directly to the jurors themselves.

On November 12, 1997, the Petitioners filed a timely Suggestion for Rehearing *En Banc,* contending, among other things, that no Court of Appeals ever before had sustained a provision forbidding all post-verdict juror interviews concerning deliberations, much less one that left jurors free to speak, even about their deliberations, "on their own initiative". On November 25, 1997, the Court of Appeals entered an order denying the Suggestion

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[5] "I also instruct *you* that . . . no juror may be interviewed by anyone concerning the deliberations of the jury." App. at 19a (emphasis added).

[6] "I now instruct *you* . . . . I also instruct *you* . . ." App. at 19a (emphasis added).

for Rehearing *En Banc* and, treating the suggestion as a petition for rehearing by the panel, denying that petition. App. at 21a.

REASONS FOR GRANTING THE WRIT

This Court has not addressed directly the standard of First Amendment scrutiny that applies to post-verdict interviews with former jurors. With the exception of the Fifth Circuit in this case, no other Court of Appeals has applied a permissive and discretionary standard of First Amendment review to restrictions on post-verdict juror interviews. This disparity between the Fifth Circuit and other Courts of Appeals presents a clear conflict on an important constitutional issue that should be resolved by this Court. The issue is important because it calls into question the extent to which a court may restrict the flow of information from private citizens who have completed a stint of public service and the extent to which the public may be deprived of important information regarding the functioning of a critical and controversial aspect of the nation's judicial system.

On a practical level, the order affirmed by the Fifth Circuit is wholly out of step with widespread journalistic practice throughout the rest of the nation, where post-verdict juror interviews regarding deliberations are conducted routinely in cases of substantial public interest.[7]

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[7] *See, e.g.*, "A Stunning Verdict", November 10, 1997, *Time* (recounting statements concerning jury deliberations made to British newspaper by juror in "Boston nanny" murder trial of Louise Woodward); "Cosby extortionist guilty, faces 12-year jail sentence", July 26, 1997, *The Times-Picayune* (summarizing interviews given by jurors to reporters concerning detailed aspects of the jury's deliberations); "Guilty until proved innocent", May 27, 1997, *Kansas City Star* (recounting interview of jurors in Little Rascals Day Care Center sexual abuse trial on PBS news program *Frontline*, in which some jurors expressed regret over their guilty verdict); "CBS views justice behind closed doors", April 16, 1997, *Houston Chronicle* (review of CBS news special focusing on jury delibera-

These interviews lead to a better understanding and enhanced public acceptance of controversial verdicts and the operation of our judicial system generally, with no demonstrable ill effects on the administration of justice.[8] This Court should grant review of the Fifth Circuit's decision to resolve the sharp conflict between the Courts of Appeals and determine the appropriate standard of First Amendment review that should apply to this widespread and important journalistic activity.

I. THE DECISION OF THE FIFTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THE NINTH AND TENTH CIRCUITS THAT PROPERLY TREAT CONTENT-BASED RESTRICTIONS ON POST-VERDICT JUROR INTERVIEWS AS PROHIBITED PRIOR RESTRAINTS ON PRESS SPEECH.

The decision of the Fifth Circuit conflicts with the decisions of other circuits that have considered restrictions on post-verdict juror interviews. The Ninth and Tenth Circuits both have held that a content-based prohibition

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tions in three criminal cases, including one case where jury ostensibly engaged in nullification; deliberations were taped and broadcast; article notes that the American Bar Association supported the program as an educational tool and that videotapes of the program were sent to law libraries); "Politics: The Spin on Whitewater: Deciding on what matters", June 2, 1996, *Los Angeles Times* (recounting interview of Whitewater juror on ABC's *Nightline*). *See also United States v. Posner*, 644 F. Supp. 885 (S.D. Fla. 1986), *aff'd*, 828 F.2d 773 (CA11 1987) (court grants defendant new trial after conducting post-verdict interviews of jurors; court notes that possibility of juror misconduct first was revealed by *Wall Street Journal* article containing interview of a juror). *See also* articles cited in note 12, *infra*.

[8] Those who depend upon juror interviews to conduct empirical studies and research relating to the jury system also are directly affected by the Fifth Circuit decision. *See, e.g.*, S. Adler, *The Jury: Disorder in the Courts* (1995); *Verdict: Assessing the Jury System* (R.E. Litan, eds., 1993); S. Brill, *Trial by Jury* (1989); H. Kalven, Jr. and H. Zeisel, *The American Jury* (1966) (findings of the University of Chicago research project).

on post-verdict juror interviews is an unconstitutional prior restraint on press speech.

Unquestionably, as the Ninth and Tenth Circuits have held, a prohibition on "interviews" concerning specified subject matter is a content-based prior restraint. An "interview" is a unique combination of questions and declarative speech, which itself is a form of expression. The *American Heritage Dictionary of the English Language* defines "interview" as "a *conversation*, such as one conducted by a reporter, in which facts or statements are elicited from another". Third Edition (1992) (emphasis added). Applying this representative definition of the term "interview", the Fifth Circuit has affirmed an order literally forbidding reporters from having "conversations" with jurors if those conversations "concern" the jury's "deliberations". This prohibition clearly restricts press expression in the form of interview speech.

Prior restraints "on speech and publication are the most serious and the least tolerable infringement on First Amendment rights". *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). There is a heavy presumption against the constitutional validity of any such restriction. *Id.* at 558; *see also New York Times Co. v. United States*, 403 U.S. 713 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).[9]

In *United States v. Sherman*, 581 F.2d 1358 (CA9 1978), the Ninth Circuit held unconstitutional a district

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[9] The order affirmed by the Fifth Circuit prohibits interviews regarding deliberations "absent a special order" from the District Court. App. at 19a. This Court has declined to determine whether such a prior order requirement itself constitutes a prior restraint, but has held that a prior order requirement at the very least "requires the highest form of state interest to sustain its validity". *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 101-102 (1979).

court order that, among other things, ordered everyone, including the press, to "stay away" from the jurors and forbade jurors from discussing the underlying criminal case with anyone. The Ninth Circuit treated the order as an impermissible prior restraint on the press:

> The Supreme Court has recognized that newsgathering is an activity protected by the First Amendment, and the order here clearly restrained the media in their attempts to gather news. As the order imposed this restraint prior to any attempt to contact the jurors, there is a heavy presumption against its constitutional validity. The government in order to sustain the order must show that the activity restrained poses a clear and present danger or a serious and imminent threat to a protected competing interest; the restraint must be narrowly drawn and no reasonable alternatives, having a lesser impact on First Amendment freedoms, must be available. We believe the government has failed to meet this heavy burden. *Id.* at 1361 (citations omitted).

Likewise, in *Journal Publishing Co. v. Mechem,* 801 F.2d 1233 (CA10 1986), the Tenth Circuit invalidated an instruction to jurors that "[y]ou should not discuss your verdict after you leave here with anyone. If anyone tries to talk to you about it, or wants to talk to you about it, let me know. If they wish [to] take the matter up with me, why, they may do so, but otherwise, don't discuss it with anyone." The Tenth Circuit recognized that this ban was directed both to jurors and the press, and applied prior restraint analysis. Citing *Sherman, supra,* and the Fifth Circuit's decision in *Express-News, supra,* the Tenth Circuit held that the restriction violated the First Amendment:

> [W]hile a court may broadly proscribe attorney and party contact with former jurors, it does not have the same freedom to restrict press interviews with former jurors.
>
> Newsgathering is an activity protected by the First Amendment. Even though the First Amendment does not invalidate every burdening of the press, or

> provide an unrestrained right to gather information, any inhibitions against news coverage of a trial carry a heavy presumption of an unconstitutional prior restraint. *Sherman*, 581 F.2d at 1361. If a court order burdens constitutional rights and the action proscribed by the order presents no clear and imminent danger to the administration of justice, the order is constitutionally impermissible. A court may impose a prior restraint on the gathering of news about one of its trials only if the restraint is necessitated by a compelling governmental interest. *Express-News*, 695 F.2d at 810, *Sherman*, 581 F.2d at 1361. *Id.* at 1236 (other citations omitted).

In contrast with the Ninth and Tenth Circuits, the Fifth Circuit in this case has applied a significantly less rigorous standard of review to uphold the District Court's restraint on press speech. In a clear retreat from the stringent standard it had announced in *Express-News*,[10] the Fifth Circuit has decided to apply a new, "tempered" standard purportedly governing restrictions on post-verdict juror interviews relating to jury "deliberations":

> Our Court's decision in *Express-News* articulated a strict standard for the restriction of post-verdict interviews of jurors in criminal cases. However, the application of that rule must be tempered, . . . by the recognition that, members of the press, in common with all others, are free to report whatever takes place in open court, but enjoy no special, First Amendment rights of access to matters not available to the public at large. *The particulars of jury deliberations fall in the latter class.* App. at 5a-6a (emphasis in original) (citation and quotation marks omitted).

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[10] Although the Fifth Circuit, in upholding a "narrow restriction" forbidding interviews revealing the "specific votes" of non-interviewed jurors, had earlier treated that restriction as "well within the [district court's] discretion", *United States v. Harrelson*, 713 F.2d 1114, 1118 (CA5 1983), *cert. denied*, 465 U.S. 1041 (1984), never until now has the Fifth Circuit held that it would not apply the strict *Express-News* standard to a sweeping prohibition virtually identical to the local rule held unconstitutional in *Express-News* itself.

This "tempered" standard conflicts directly with the stringent prior restraint standard of review applied by both the Ninth and Tenth Circuits.[11]

There can be no clearer proof of this conflict between the Courts of Appeals than the experience of the press in the Tenth Circuit (where *Mechem* controls) following the recent criminal trials of Timothy McVeigh and Terry Nichols for crimes arising from the bombing of the Albert R. Murrah Federal Building in Oklahoma City. In Denver, immediately upon the conclusion of each trial, the press freely interviewed willing jurors concerning the deliberations of those juries.[12] Jurors openly discussed all apects of their deliberations. The jurors' comments gave the nation and particularly the victims' families unique insight

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[11] *See also United States v. Antar*, 38 F.3d 1348 (CA3 1994) (Third Circuit notes that to justify limitations on juror interviews, "threats to that process [of jury deliberations] must be actual and specific, not conclusory and generic", 38 F.3d at 1363, and the court must "ensure that the limitation imposed is the least restrictive means possible". *Id.* Third Circuit does not vacate order providing that "no inquiry may be made into the specific votes, statements, opinions or other comments of any juror during deliberations other than the juror being interviewed" because "[w]e cannot ascertain after the fact whether the . . . restriction was necessary one year ago under the circumstances of this specific case . . . [although] [w]e are troubled by the lack of explanation for its imposition here". 38 F.3d at 1364). The new standard adopted by the Fifth Circuit also conflicts with the traditional strict scrutiny analysis employed by the Third Circuit in *Antar*.

[12] *See, e.g.*, "Nichols Juror Says Most Favored Murder Conviction: Panelists Pushed for Harsh Sentence", January 9, 1998, *The Denver Post*; "Nichols Jurors Reveal Support for Execution", January 9, 1998, *Los Angeles Times*; "Juror Critical of Prosecution Attitude", January 8, 1998, *The Boston Globe*; "Oklahoma City Verdict; The Jurors; Frustration and Deadlock as the Panel Splits Three Ways", January 8, 1998, *The New York Times*; "McVeigh Jurors Reflect on Life-Changing Decision of Death", June 16, 1997, *The Associated Press*; "McVeigh Jury Foreman Talks More About the Case and the Decision", June 16, 1997, *CNN Prime News*; "Methodically, McVeigh Jury Weighed Facts", June 16, 1997, *The New York Times*.

into the conscientiousness and thoughtfulness of the jurors. Despite pervasive print and broadcast news coverage of both trials, neither the McVeigh nor the Nichols jurors were restricted from speaking out by District Judge Matsch, nor did Judge Matsch even remotely intimate that the national press corps could be ordered not to interview the jurors in either case.[13] Under the June 27 Order affirmed by the Fifth Circuit, however, the interviews freely undertaken in Denver would have been punishable by contempt in Houston, Jackson, or New Orleans.

This conflict between the Fifth Circuit and the Ninth and Tenth Circuits can be traced in part to the faulty reasoning employed by the Fifth Circuit in reaching its decision. The Fifth Circuit asserts that the strict standard of its prior juror interview case, *Express-News*, must be "tempered" by the recognition that "members of the press . . . enjoy no special, First Amendment rights of access to matters not available to the public at large". App. at 5a. This reasoning confuses the proper constitutional standard for determining press access to the judicial process itself with the correct standard for reviewing direct prohibitions on press speech in the form of post-verdict juror interviews that relate to, but are not part of, the judicial process.

No other Court of Appeals ever has intimated that judicial access analysis (which would be appropriate to evaluate a request for contemporaneous access to secret juror deliberations) should be used to justify perpetual restrictions on traditionally open, post-verdict interviews with discharged jurors. If the traditional lack of contemporaneous access to jury deliberations were the dispositive inquiry regarding the availability of voluntary, post-verdict interviews with jurors, then *no* juror inter-

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[13] Indeed, when dismissing the McVeigh jurors, apparently applying the Tenth Circuit's *Mechem* standard, Judge Matsch stated that he *could not* bar the jurors from publicly discussing what took place in the jury room. *See, e.g.*, "McVeigh Sentenced to Die; Judge Tells Jurors: You Do not Have to Answer to Anyone", June 14, 1997, *Chicago Tribune*.

views concerning deliberations ever would be available in any case, a result that no court ever has suggested.

Moreover, and contrary to the precedent of this Court, the Fifth Circuit treats this prior restraint on the press as more permissible than a restraint on jurors. This treatment turns on its head the substantial body of caselaw which generally has held restraints on trial participants to a *lesser* degree of scrutiny than restraints on the press itself. *See, e.g., Gentile v. State Bar of Nevada,* 501 U.S. 1030 (1991); *Nebraska Press, supra,* 427 U.S. 539; *In re Application of Dow Jones & Co., Inc.,* 842 F.2d 603, 608 (CA2), *cert. denied,* 488 U.S. 946 (1988) ("[T]here is a substantial difference between a restraining order directed against the press—a form of censorship which the First Amendment sought to abolish from these shores—and the order here directed solely agaist trial participants and challenged only by the press"); *Radio & Television News Ass'n v. United States Dist. Court for the Central Dist. of California,* 781 F.2d 1443, 1446 (CA9 1986) ("[T]he district court's order in this case is not directed to the press at all. . . . In fact, the press remains free to direct questions at trial counsel. Trial counsel simply may not be free to answer"). There is no basis for imposing a content-based restraint on press speech while allowing the subjects of the forbidden interviews to speak freely.[14] The order affirmed by the Fifth Circuit clearly conflicts with the decisions of the Ninth and Tenth Circuits in *Sherman, supra,* and *Mechem, supra,* and is contrary to the precedents of this Court disapproving entry of prior restraints.

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[14] This is not to say that the defective June 27 Order may be remedied merely by imposing its perpetual prohibition on jurors and the press or on jurors but not the press. So sweeping a restriction on disclosure regarding deliberations (banning for all time even disclosure of a juror's *own* thoughts, comments, reactions, etc. during deliberations) never before has been upheld by any federal circuit court, regardless of the target of the restriction. *See Mechem, supra*; *Sherman, supra.*

II. THE FIFTH CIRCUIT'S DECISION PRESENTS IMPORTANT QUESTIONS REGARDING THE LEVEL OF CONSTITUTIONAL SCRUTINY THAT APPLIES TO CONTENT-BASED RESTRICTIONS ON PRESS INTERVIEWS OF FORMER JURORS.

A. The Decision of the Fifth Circuit to Apply a "Tempered" Standard of Review to Content-Based Restrictions on Post-Verdict Juror Interviews is Contrary to the Decisions of this Court.

This Court has not determined the appropriate standard of First Amendment scrutiny for reviewing content-based restrictions on post-verdict juror interviews. Because the opportunity for such interviews arises daily throughout the nation, it is important that this Court determine a uniform, national standard. As matters now stand, in contrast with the precedents of this Court, the other Courts of Appeals that have addressed this issue, and the Fifth Circuit's own decision in *Express-News,* the Fifth Circuit now has made clear that it will not closely review restrictions involving post-verdict interviews with jurors regarding their "deliberations" in any case involving extensive news coverage.

As discussed above, both the Ninth and Tenth Circuits treat content-based restrictions on post-verdict juror interviews as unconstitutional prior restraints. This Court should adopt the reasoning of the Ninth and Tenth Circuits, and confirm that content-based restrictions on post-verdict juror interviews are prior restraints and therefore are presumptively unconstitutional.

Even were this Court to reject the prior restraint analysis employed by the Ninth and Tenth Circuits, this Court's own First Amendment precedents require, at a minimum, that content-based restrictions on post-verdict juror interviews (whether directed at the press, jurors, or both) receive strict scrutiny analysis. The restriction on post-verdict juror interviews upheld by the Fifth Circuit is

directed only at one category of press speech related to the functioning of the judicial process—speech relating to "deliberations" of the jury—which the Fifth Circuit would distinguish from other speech relating to the judicial process, including speech relating to the jurors' "general reactions" to the trial. Even if not a prior restraint, this restriction constitutes a classic, content-based restriction on speech.[15] This Court has held that content-based restrictions are subject, at a minimum, to strict scrutiny review. *See, e.g., Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("[T]he State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end", *quoting Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987)).[16]

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[15] That a restriction is not viewpoint-based does not render the restriction content-neutral. "'[T]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'" *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (*quoting Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 537 (1980)). Moreover, to the extent that the June 27 Order seeks to protect the supposed "mystique" that surrounds the "black box" of jury deliberations, that justification is constitutionally impermissible. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978) ("Our prior cases have firmly established . . . that injury to official reputation is an insufficient reason for repressing speech that would otherwise be free . . . . [S]peech cannot be punished when the purpose is simply to protect the court as a mystical entity . . ") (citation and quotation marks omitted); *Consolidated Edison, supra*, 447 U.S. at 538 ("To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 515 (1981) ("With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse . . ."); *see also* concurring op. of Stevens, J., *Id.* at 553 ("The essential concern embodied in the First Amendment is that government not . . . select the topics on which public debate is permissible").

[16] Justice Kennedy has indicated that he would treat content-based restrictions on speech as *per se* unconstitutional. *See Simon*

In this case, the Fifth Circuit's decision fails to include any of the traditional hallmarks of strict scrutiny. The Fifth Circuit sustained the June 27 Order based solely upon the generic determination that the underlying criminal action involved extensive media coverage, that extensive media coverage *ipso facto* poses a threat to the integrity of jury deliberations, and that this threat requires a total prohibition on juror interviews concerning deliberations.[17]

& Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 124 (1991) (Kennedy, J., concurring).

[17] *Clark v. United States*, 289 U.S. 1 (1933), cited by both the District Court and the Fifth Circuit in support of this proposition, did not involve any of the First Amendment issues presented by this case. In *Clark*, this Court addressed whether a former juror could claim a privilege to bar admission of testimony regarding her behavior during deliberations. The stated justification for such a privilege was that freedom of deliberations would be "stifled" if the particulars of a juror's deliberations could be revealed *against that juror's wishes*, 289 U.S. at 20-21. The Court held that, assuming such a privilege exists, it did not apply in that case, because the juror in question had fraudulently obtained a seat on the jury. *Id.*

Implicit recognition of a privilege against involuntary disclosure of one juror's deliberations, however, cannot justify imposition of a sweeping restriction on the content of voluntarily given interviews with a former juror regarding the deliberations generally or regarding his or her own thoughts and conduct during deliberations. As with any privilege, the holder of the "juror" privilege is free to waive the privilege as it applies to him or her.

Similarly, the reasoning articulated in this Court's decision in *Tanner v. United States*, 483 U.S. 107 (1987) cannot justify the broad prohibition affirmed by the Fifth Circuit. In *Tanner*, this Court affirmed application of Fed. R. Evid. 606(b), which limits the admissibility into evidence of the testimony of a juror for the purpose of impeaching a verdict. The Court justified the holding in part on the need to protect "full and frank discussion in the jury room", 483 U.S. at 120-21. That evidentiary rule did not, however, purport to prevent jurors from speaking willingly outside of court proceedings, or even from testifying regarding their deliberations in court proceedings unrelated to impeachment of the verdict. In-

Thus, the Fifth Circuit does not require that the "threat to the process be actual and specific, not conclusory and generic", *Antar, supra,* 38 F.3d at 1363. Aside from pure speculation, there is no evidence that categorically prohibiting all post-verdict juror interviews concerning the jury's deliberations is necessary to protect the ability of any jury to deliberate freely. Indeed, common sense teaches that the jury system continues to function effectively, and did in this case, despite the fact that juror interviews are widely available and despite highly publicized post-verdict juror interviews in such cases as McVeigh and Nichols.[18]

In addition, the June 27 Order is not narrowly tailored to protect the asserted governmental interest in assuring jurors that their deliberations will not be broadcast to all the world. To the contrary, the June 27 Order sweeps within its broad prohibition even voluntary interviews by jurors who restrict their comments to their own votes and opinions and carefully refrain from disclosing the concerns of their colleagues who choose not to talk.[19] Accord-

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deed, in *Express-News*, the Fifth Circuit explicitly rejected the argument that Rule 606(b) could be used to justify a prophylactic ban on post-verdict juror interviews. 695 F.2d at 810.

[18] That the Nichols jurors were able to reach a verdict drastically different from the McVeigh jurors, even after the highly publicized post-verdict interviews of the McVeigh jurors, also confirms that restrictions on voluntarily given post-verdict interviews are not necessary to protect the ability of future jurors to deliberate.

[19] Although the Fifth Circuit never attempted to explain how an order having this effect could be narrowly tailored, the District Court did attempt to address these questions by asserting, without citation of authority, that:

> Because deliberations are a collaborative process, each juror's role in the deliberations is so inextricably intertwined with the role of other jurors that such an order would be ineffective

ing to the Fifth Circuit, a broad prohibitory order forbidding interviews of both willing and unwilling jurors somehow is narrowly tailored simply because the order is entered in a case that involves a "great amount of media coverage".[20] App. at 4a. But this conclusion is a non-sequitur and effectively dispenses with the requirement of narrow tailoring.

Finally, in affirming the June 27 Order, the Fifth Circuit gave absolutely no consideration to alternatives to the order's sweeping prohibition which, if implemented, would render the order unnecessary. For example, *voir dire* could be employed in highly publicized cases to screen for jurors who somehow might feel inhibited by the prospect of post-verdict interviews.[21]

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in protecting the compelling governmental interest in preserving the confidentiality of the deliberations. App. at 16a.

This assertion, however, is purely speculative and demonstrably false; no other court ever has suggested that it is impossible to differentiate between disclosure of a juror's own votes and comments and those of other jurors who choose not to be interviewed. *See United States v. Antar*, 38 F.3d 1348 (CA3 1994).

[20] The Fifth Circuit distinguished this case which it said had "a great amount of media coverage . . . from start to finish" from "the run-of-the-mill criminal trial". App. at 4a. This purported distinction is utterly elastic, however, and would allow entry of the June 27 Order in virtually any case in which the press might desire to interview former jurors. The press in the Fifth Circuit will be permitted to conduct interviews regarding deliberations only in non-newsworthy cases, and will be prohibited from conducting interviews in every case that triggers "a great amount of media coverage," *i.e.*, every newsworthy case.

[21] In addition, the June 27 Order was issued without notice to the press or a hearing on the need for and propriety of entering such an order. *See Nebraska Press, supra*, 427 U.S. at 608 (Brennan, J., concurring). Further, the June 27 Order prohibits interviews "by anyone" and therefore purports to bind "all the world". Such orders are objectionable on grounds of jurisdiction, procedure, scope and enforceability. *See Nebraska Press, supra*, 427 U.S. at 565-566; *The Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227-228 (CA6 1996) (Boyce, J., concurring).

B. The Fifth Circuit's Decision, Which Restrains the Press but Leaves Jurors Wholly Free to Speak Regarding Any Aspect of Their Service, is Ineffective at Protecting an Interest of the Highest Order and Therefore is Contrary to the Decisions of This Court.

Inexplicably, while barring the press from conducting post-verdict juror interviews, the Fifth Circuit simultaneously leaves the jurors themselves free to speak, "on their own initiative", about any aspect of their jury service. This bizarre "can't ask, can tell" rule prohibits the Petitioners from asking jurors anything about their deliberations—even from asking jurors willing to be interviewed solely about their own jury-room comments and actions—while leaving the jurors themselves free to publicize absolutely anything they may choose to reveal about the jury's deliberations, including the minute details of the votes and statements of other jurors not wishing to have their activities disclosed. Thus, in violation of the clear precedent of this Court, the June 27 Order is ineffective in protecting the confidences that jurors express in the jury room.

Both the District Court and the Court of Appeals justified the June 27 Order by quoting from this Court's opinion in the testimonial privilege case, *Clark v. United States*, 289 U.S. 1, 13 (1933):

> Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. App. at 6a and 14a.

The Fifth Circuit held that the June 27 Order "was an appropriate measure taken to address the danger, identified in *Clark*, that compromises of the secrecy of jury deliberations presents [*sic*] to our criminal justice system's reliance on jury determinations". App. at 6a.

Given this justification for entry of the June 27 Order, it is ironic that the order upheld by the Fifth Circuit broadly restrains press interviews of jurors concerning

deliberations while leaving jurors free "on their own initiative" to make statements revealing what arguably are the most "private" portions of jury deliberations—the votes and comments of other jurors who do not consent to such disclosure. This incongruous dichotomy renders the order wholly ineffective in preventing harm to the deliberative process, even assuming that open discussion of that process is injurious rather than beneficial.

This Court consistently has invalidated restrictions on First Amendment freedoms that are ineffective in protecting countervailing interests. For example, in *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979), this Court considered the constitutionality of a state statute purporting to restrict only newspapers from publishing the names of juvenile defendants, while permitting television, radio, and other discussion and publicity. The Court held the statute unconstitutional because television, radio, and all other means of communication remained unfettered. The Court held, "even assuming the statute served a state interest of the highest order, it [did] not accomplish its stated purpose". *Id.* at 105; *see also* concurring op. of Rehnquist, J., 443 U.S. at 110; *The Florida Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989) ("When a state attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant. . . . Without more careful and inclusive precautions against alternative forms of dissemination, we cannot conclude that Florida's selective ban on publication by the mass media satisfactorily accomplishes its stated purpose") (*citing Smith v. Daily Mail* and other cases); *see also* concurring op. of Scalia, J., 491 U.S. at 541-542;[22] *Nebraska Press, supra,* 427 U.S. at 567 ("It

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[22] "I think it is sufficient to decide this case to rely upon the third ground set forth in the Court's opinion that a law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves

is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. . . . [P]lainly a whole community cannot be restrained from discussing a subject intimately affecting life within it. Given these practical problems, it is far from clear that a prior restraint on publication would have [accomplished the purported purpose of the restraint]").

Like the orders at issue in *Smith, Florida Star* and *Nebraska Press,* the order upheld by the Fifth Circuit is ineffective at protecting jurors from involuntary disclosure of the details of their deliberations. Although the press is prevented from conducting "interviews" of jurors, the jurors themselves remain free to talk to family, friends, school, church and civic groups, to write letters to the editor, even to publish books and to appear on talk shows, "on their own initiative". Accordingly, no substantial governmental interest can be served by restraining the press alone, and the order cannot withstand constitutional scrutiny.

In short, the Fifth Circuit's "can't ask, can tell" rule restricting press interviews with jurors but not speech by the jurors themselves cannot be reconciled with this Court's precedents holding similar restrictions unconstitutional under the First Amendment because they fail to protect a substantial countervailing interest. Certiorari should be granted to bring the Fifth Circuit's aberrant rule into line with this Court's clear First Amendment precedents.

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appreciable damage to that supposedly vital interest unprohibited. . . . This law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself. Such a prohibition does not protect an interest of the highest order." (citation and quotation marks omitted).

III. THE FIFTH CIRCUIT'S DECISION THAT THE JUNE 27 ORDER IS NOT UNCONSTITUTIONALLY VAGUE CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Finally, despite the Fifth Circuit's summary rejection of the Petitioners' concerns as "semantical gymnastics", the June 27 Order suffers from another constitutional flaw often associated with content-based restrictions on speech: vagueness. The press must guess on pain of contempt the hazy boundaries between "deliberations" and "general reactions" and between "interviews" and "statements" made by jurors "on their own initiative". Faced with these daunting dilemmas, news organizations will "steer far wider of the unlawful zone", *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (citation and quotation marks omitted), and conduct highly sanitized, artificially structured interviews to avoid prosecution for contempt.

This Court has emphasized repeatedly that the vagueness of a content-based regulation of speech "raises special First Amendment concerns because of its obvious chilling effect on free speech". *Reno v. ACLU*, —— U.S. ——, 117 S. Ct. 2329, 2344 (1997); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048-1051 (1991). There are even "greater First Amendment concerns" when violations of the regulation may trigger criminal sanctions because "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images". *Reno v. ACLU*, *supra*, 117 S. Ct. at 2345. The June 27 Order affirmed by the Fifth Circuit presents both of these concerns: it is a content-based restriction on speech, and violation of the order carries with it the threat of punishment for criminal contempt of the order.

The one-sentence June 27 Order is fatally ambiguous in three respects. First, the order itself does not elaborate on the meaning of "deliberations" and leaves affected per-

sons to guess at the topics of speech that are permitted and prohibited by the order. Although the Fifth Circuit sought to clarify some of these uncertainties—all the while debunking the Petitioners' concerns as "semantical gymnastics"—the Fifth Circuit nevertheless affirmed the June 27 Order as given. The Fifth Circuit's clarifications, then, leave the order itself fatally ambiguous yet subject to verbatim replication in future cases. Moreover, the Court of Appeals' discussion of the meaning of "deliberations" is greatly at odds with the District Court's definition of the same term.[23] There could be no better evidence of the inherent and impermissible vagueness of the June 27 Order than that the court that issued the order and the court that reviewed it cannot agree on its meaning.

Second, as noted above, the June 27 Order does not provide guidance as to the meaning of an "interview" or as to the boundaries between an "interview" and a juror's statement "on his own initiative". The jurors and members of the press can only guess at the particular conduct that might be viewed by the court as a forbidden interview regarding "deliberations" or as a permitted statement by a juror "on his own initiative".[24]

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[23] Thus, while the Fifth Circuit appears certain that "deliberations" means only the closed-door discussions between jurors that take place after completion of the trial, the District Court apparently has a far broader conception of the term—the "entire process" by which jurors reach a verdict, which "includes" (but evidently is not limited to) the meaning proffered by the Fifth Circuit.

[24] If a reporter contacts a juror to ask questions about the juror's "general reactions", but nevertheless the juror volunteers comments about "deliberations", has the reporter engaged in a prohibited "interview" that subjects the reporter to a possible contempt citation? Must a reporter stop a juror from commenting or warn the juror if the reporter asks about "general reactions" and the juror starts to discuss "deliberations"? If a juror, on his or her "own initiative", makes a statement about "deliberations", is the press barred from asking that juror any follow-up questions lest the conversation be viewed as an "interview"? Is any conversation between a news reporter and a juror (as distinguished from a unilat-

Third, the June 27 Order is vague in another, even more fundamental respect: the order does not make clear to jurors that it does not purport to restrict their speech. Although the Fifth Circuit opinion limits the reach of the June 27 Order to would-be interviewers and clearly embraces the "can't ask, can tell" rule, there is nothing in the order itself to signal to jurors that this is so. The effect of the order, then, may well be to stifle all speech about the jury's deliberations, including comments of the jurors "on their own initiative".

In reaching the conclusion that the June 27 Order is not vague, the Fifth Circuit did not simply misapply constitutional vagueness precedents. The Fifth Circuit, rather, failed to recognize that this Court's decisions require close consideration of vagueness concerns when First Amendment interests are at stake, and that those decisions require doubly close consideration when violation of an arguably vague restriction on speech may be punishable by criminal sanctions. *See, e.g., Reno v. ACLU, supra.* Ignoring those precedents, the Fifth Circuit chose once again to apply a permissive standard of review, acknowledging that "[t]he term 'deliberations of the jury' may not be a paragon of definiteness and precise meaning", but finding that because the term "does . . . bring an immediate image to mind" [jurors debating in the jury room], the term is "sufficiently definite to convey the idea the district court intended". App. at 7a. The Fifth Circuit showed no recognition of the heightened standard required for evaluating vagueness in a First Amendment context. The effect of this failure was to leave intact a restriction on speech, punishable by criminal contempt, that is hopelessly vague not only as to what it prohibits and permits, but also as to whom it restricts in the first place.

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eral statement volunteered by a juror in which only the juror speaks) in which a juror mentions "deliberations" an "interview" concerning "deliberations" that could result in a contempt citation?

CONCLUSION

The jury is as controversial as any aspect of the modern American legal system. Americans are exposed daily to troubling questions about the jury system, ranging from jury nullification, to burgeoning punitive damage verdicts, to the role of race, gender and class in jury selection and jury verdicts, to the competence of lay juries to decide complex cases. If not reversed, the order affirmed by the Fifth Circuit will be widely imitated and will drastically hamper not only vital news coverage of the judicial system but also a wide range of important empirical study and research. Post-verdict juror interviews serve a classic First Amendment function in today's world of acute interest in the American jury system: they provide a foundation for public discussion, and acceptance of controversial verdicts, and they preserve the possibility of constructive reform. For the reasons stated, this Court should grant certiorari to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

[Filed Oct. 29, 1997]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30756

UNITED STATES OF AMERICA,
Plaintiff,

versus

CARL W. CLEVELAND, *et al.*,
Defendants,

TIMES PICAYUNE PUBLISHING CORPORATION;
MICHAEL PERLSTEIN; CAPITAL CITY PRESS; JOE GYAN,
Intervenors-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before GARWOOD, DUHE, and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

The Times-Picayune Publishing Corporation (publisher of the *New Orleans Times-Picayune*), Capital City Press (publisher of the *Baton Rouge Advocate*), Michael Perlstein (a *Times-Picayune* reporter), and Joe Gyan (an *Advocate* reporter) (collectively, "the newspapers") complain that an order entered in the United States District

Court for the Eastern District of Louisiana unconstitutionally restricts their ability to pursue post-verdict interviews with jurors in a high-profile criminal trial. Finding no error, we affirm.

I.

This appeal arises from a federal criminal trial of six defendants for racketeering and related offenses. The alleged crimes arose from attempts to influence legislation affecting the video poker industry in Louisiana. The defendants included two former Louisiana state senators, and the witnesses included an archbishop and a former governor. The trial attracted close attention from the Louisiana press. On June 27, 1997, after a six-week trial and eight days of jury deliberation, four defendants were convicted on some counts and acquitted on others; two defendants were acquitted of all charges.

After the jury rendered its verdict, United States District Judge Sarah S. Vance addressed the jury. During a monologue in which she thanked the jurors for their service, she issued the following order:

> I now instruct you that you have no obligation to speak to any person about this case. *I also instruct you that, absent a special order by me, no juror may be interviewed by anyone concerning the deliberations of the jury.* I also instruct you that the lawyers and the parties are not to attempt to question you without an order from me.

(Emphasis supplied.)

Eighteen days later, on July 15, 1997, the newspapers appeared before the court. They filed a motion to modify the above-described order, contending that the italicized portion thereof violates their right to gather news and that it is unconstitutionally vague. On July 22, 1997, Judge Vance issued an opinion declining to modify her order.

On July 31, 1997, the newspaper filed an emergency motion with this Court for an expedited appeal from the decision of the district court. That motion was granted.

II.

The newspapers claim that their First Amendment "right to gather news" has been compromised by Judge Vance's order and rely principally on *In re The Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982). In *Express-News* this Court held that a "court rule cannot . . . restrict the journalistic right to gather news unless it is narrowly tailored to prevent a substantial threat to the administration of justice." *Express-News*, 695 F.2d at 810. The order entered by Judge Vance in this case is sufficiently narrow to satisfy the requirement of *Express-News*.

In *Express-News*, the district court had applied its local rule which provided "that no person shall 'interview . . . any juror, relative, friend or associate thereof . . . with respect to the deliberations or verdict of the jury in any action, except on leave of court granted upon good cause shown.'" *Id.* at 808 (omissions in original). In striking down the rule, this Court identified a number of factors which made it offensive:

> The rule is unlimited in time and in scope, applying equally to jurors willing and anxious to speak and to jurors desiring privacy, forbidding both courteous as well as uncivil communications, and foreclosing questions about a juror's general reactions as well as specific questions about other jurors' votes that might, under at least some circumstances, be inappropriate.

Id. at 810. *Express-News* also expressed concern that the order in that case "implicitly sanction[ed] juror[s'] conversations with their relatives, friends, and associates." *Id.* The order entered by Judge Vance shares very little with the unconstitutional order entered in *Express-News*.

First, although unlimited in time, the scope of Judge Vance's order is more limited than that in *Express-News*. It applies only to interviews with the jurors themselves and not those with jurors' relatives, friends, or associates. Also, it applies only to "deliberations of the jury" and not to the verdict itself. The fact that the order was unlimited in time is not, in itself, dispositive, as we approved the use of restrictions without time limitations in *United States v. Harrelson*, 713 F.2d 1114 (5th Cir. 1983), *cert. denied*, 465 U.S. 1041 (1984).

Furthermore, though Judge Vance's order "appl[ies] equally to jurors willing and anxious to speak and to jurors desiring privacy, forbidding both courteous as well as uncivil communications," the presence of these factors is not dispositive of our inquiry. *Express-News* suggests that in some cases instructions meeting this description will be unconstitutional because they are broader than necessary to justify the restriction of newsgathering rights in light of some other countervailing consideration. However, the present case is distinguishable from the run-of-the-mill criminal trial in this regard because there was a great amount of media coverage of the trial from start to finish. *See, e.g., Harrelson*, 713 F.2d at 1117; *United States v. Antar*, 38 F.3d 1348, 1364 (3d Cir. 1994). This factor justifies the imposition of the order entered in this case without regard to the willingness of the jurors to be interviewed or the civility of the reporters seeking to conduct interviews.

The order entered by Judge Vance does not foreclose "questions about a juror's general reactions," as did the order in *Express-News*. The newspapers have argued that the use of the term "deliberations" is imprecise and might be construed by jurors wishing to speak as extending to their individual reactions to the trial proceedings occurring in open court. We disagree. The restriction of post-verdict interviews concerning "jury deliberation" was expressly endorsed by this Court in *Harrelson*. *See Harrel-*

son, 713 F.2d at 1118. As contemplated by *Harrelson* and as used in Judge Vance's order, "deliberations" refers only to the discussions about the case occurring among jurors within the sanctity of the jury room. A juror in this case may be interviewed about his own "general reactions" to the trial proceedings, and he is only prevented from being interviewed about the private debates and discussions which took place in the jury room during the time leading up to the jury's rendering of its verdict.

The order entered by Judge Vance does not purport to prevent jurors from speaking out on their own initiative. It thus does not raise the concern expressed in *Express-News* that an order limiting post-verdict interviews might implicitly sanction jurors' conversations with their relatives, friends, and associates. A juror who wishes to do so may make a statement.

Finally, Judge Vance's order does not require "good cause shown," as did the order in *Express-News.* As the opinion in *Express-News* notes, a court may not impose a restriction on post-verdict interviews and then condition the restriction by requiring "those who would speak freely to justify special treatment by carrying the burden of showing good cause." *Express-News,* 695 F.2d at 810. The order imposed by Judge Vance does not purport to shift to the media "the burden of demonstrating the need for curtailment," *id.,* and is in this respect distinguishable from the order stricken in *Express-News.*

Our Court's decision in *Express-News* articulated a strict standard for the restriction of post-verdict interviews of jurors in criminal cases. However, the application of that rule must be tempered, as it was in *Harrelson,* by the recognition that "members of the press, in common with all others, are free to report whatever takes place in open court but enjoy no special, First Amendment right of access to matters not available to the public at large. *The particulars of jury deliberation fall in the*

latter class . . . ." *Harrelson*, 713 F.2d at 1118 (emphasis supplied). We noted in *Harrelson*, and we reiterate here, the Supreme Court's admonition that "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Clark v. United States*, 289 U.S. 1, 13 (1933) (Cardozo, J.).

Judge Vance's order was an appropriate measure taken to address the danger, identified in *Clark*, that compromises of the secrecy of jury deliberations presents to our criminal justice system's reliance on jury determinations. Thus, following our Court's precedents, we find that the order entered by Judge Vance was narrowly tailored to prevent a substantial threat to the administration of justice—namely, the threat presented to freedom of speech within the jury room by the possibility of post-verdict interviews.

III.

The newspapers contend that the district court's order is unconstitutionally vague. As mentioned above, they maintain that the reference to "deliberations" is unclear, failing to give adequate notice to jurors, the press, and the public. However, as noted above, we disagree with this characterization of the order.

The newspapers contend that the reference to jury "deliberations" is vague because it prompts speculation as to whether it contemplates "an individual juror's particular 'deliberations' (as distinguished from the 'jury' as a whole)" or "generalized descriptions of the jury's 'deliberations' (as opposed to descriptions of the specific positions taken by other particular jurors)" or "virtually all aspects of the jurors' service as jurors (for example, an individual juror's thoughts, impressions and feelings ('deliberations') formed while listening to evidence presented during the trial)." Though these semantical gymnastics

presented in the newspapers' brief are impressive, they are distinctions that only a lawyer would appreciate.

The term "deliberations of the jury" may not be a paragon of definiteness and precise meaning. Few terms in our language are. The term does, however, bring an immediate image to mind: the members of a jury in the jury room discussing and debating the evidence, the testimony, and the instructions from the court in order to reach a verdict. We hold that the term "jury deliberations" is sufficiently definite to convey the idea the district court intended and does not realistically threaten First Amendment protected communication. That is all that the law requires. *See Kolender v. Lawson,* 461 U.S. 352, 357 (1983) (void-for-vagueness doctrine requires definition "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement").

IV.

For the aforementioned reasons, the validity of the district court's order restricting post-verdict juror interviews is AFFIRMED.

APPENDIX B

[Filed July 22, 1997]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Criminal Action No. 96-207

Section "R"

UNITED STATES OF AMERICA

versus

CARL CLEVELAND, *et al.*

ORDER GRANTING MOTION TO INTERVENE AND DENYING MOTION TO MODIFY ORDER RESTRICTING JUROR INTERVIEWS BY THE TMES-PICAYUNE PUBLISHING CORPORATION, MICHAEL PERLSTEIN, CAPITAL CITY PRESS AND JOE GYAN

Before the Court is a motion to intervene and a motion to modify this Court's June 27, 1997 Order restricting juror interviews concerning juror deliberations, both of which were filed by the Times-Picayune Corporation, Michael Perlstein, Capital City Press and Joe Gyan (collectively, "Movants"). For the reasons that follow, the motion to intervene is GRANTED and the motion to modify the June 27, 1997 Order is DENIED.

I. BACKGROUND

On June 27, 1997, after a trial that lasted approximately six weeks and deliberations that lasted for more

than seven days, the jury returned a verdict in this well-publicized political corruption case. The defendants, former Louisiana State Senators Larry Bankston and Benjamin Bura "B.B. Sixty" Rayburn; video poker entrepreneur, Fred Goodson; Goodson's daughter, Maria Goodson; Goodson's lawyer, Carl Cleveland; and Goodson's accountant, Joe Morgan, were each accused of racketeering and other related offenses in connection with allegedly illegal attempts to secure the passage of certain legislation and/or defeat the passage of other legislation in connection with the video poker industry. The jury found defendants Bankston, Cleveland, Fred Goodson, and Maria Goodson guilty of certain counts and not guilty of others and found defendants Rayburn and Morgan not guilty of all counts. The Baton Rouge and New Orleans press have covered the case closely from the beginning to the end of the trial and have had access to the proceedings from begining to end. Movants are the publishing companies of daily newspapers in Baton Rouge and New Orleans and news reporters who work at each of the Baton Rouge and New Orleans papers in question.[1]

After the verdict was returned on June 27, 1997, the Court issued the following order to the jurors in open court:

> I now instruct you that you have no obligation to speak to any person about this case. I also instruct you that, absent a special order by me, no juror may be interviewed by anyone concerning the deliberations of the jury. I also instruct you that the lawyers and the parties are not to attempt to question you without an order from me.

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[1] Capital City Press publishes the *Advocate*, a daily newspaper circulated in the Baton Rouge metropolitan area. Joe Gyan is employed as a news reporter for the *Advocate*. The Times-Picayune Publishing Corporation publishes the *Times-Picayune*, a daily newspaper circulated in the New Orleans metropolitan area. Michael Perlstein is employed as a news reporter for the *Times-Picayune*.

See Memorandum in Support of Motion to Modify Order Restricting Juror Interviews, Exhibit A, Excerpt from June 27, 1997 Proceedings.

Movants take issue with the second of the above quoted sentences [2] and move to intervene in this case on the grounds that the order is violative of their First Amendment rights in two respects. First, Movants contend that the order wrongly requires Movants to seek a "special order" before they interview jurors concerning the deliberations of the jury. Second, Movants argue that the order is overbroad in its attempt to "shroud all deliberations of the jury in secrecy." Movants therefore request that the Court modify the existing order by dropping the "special order requirement" and dropping the restriction on interviews concerning the deliberations of the jury. After a careful consideration of the record in this case and the relevant law, the Court concludes that the order in question is constitutional for the reasons that follow.

II. DISCUSSION

A. Movants' Motion to Intervene

The Court must first determine whether or not the Movants have standing to challenge the Court's June 27, 1997 order. To establish standing, a news agency must show an injury in fact that fairly can be traced to the challenged act and that is likely to be redressed by the

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[2] The Court notes that this motion deals *only* with the second sentence of the June 27, 1997 order. The movants concede that the first sentence of the order is constitutional and do not challenge the third sentence of the order, which applies to the parties and the lawyers in this case. There is no question that the Court's order restricting the parties and their lawyers from contacting the jurors is constitutional. *See Hacberle v. Texas International Airlines*, 739 F.2d 1019, 1020-22 (5th Cir. 1984) (upholding order denying counsel and parties leave to interview jurors post-trial in criminal case in light of the limited first-amendment interests of litigants and their counsel).

challenged remedy. *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 472, 102 S. Ct. 752, 758-59, 70 L. Ed. 2d 700 (1982); *Davis v. East Baton Rouge Parish School Board*, 78 F. 3d 920, 926 (5th Cir. 1996); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F. 3d 546, 556 (5th Cir. 1996). In this instance, the Movants claim that they have been injured by the Court's order because it has effectively prevented them from conducting post-trial interviews of the jurors in this case. Movants move to intervene on the grounds that the Court's order violates their First Amendment rights and they cannot be made whole without a modification of the order.

The Court notes that the Federal Rules of Criminal Procedure contain no specific provision that allows intervention of third parties in a criminal proceeding. *See In re Application of the New York Times Co.*, 878 F. 2d 67, 67-68 (2d Cir. 1989) (noting that "no rule of criminal procedure allows intervention by third parties in a criminal proceeding" but finding that Court of Appeals has jurisdiction over a newspaper's appeal of a gag order); *see also, United States v. Davis*, 902 F. Supp. 98, 101 (E.D. La. 1995) (noting lack of intervention provision in Federal Rules of Criminal Procedure). Nevertheless, courts have allowed the press to intervene in criminal cases to assert its rights of judicial access. *See New York Times Co.*, 878 F. 2d at 67-68 (newspaper has standing to appeal gag order); *Davis*, 902 F. Supp. at 101 (newspaper can intervene in criminal case to challenge gag order). Moreover, courts have held that news agencies have standing to challenge orders limiting their right to interview jurors in criminal cases. *See, e.g., United States v. Harrelson*, 713 F. 2d 1114 (5th Cir. 1983), *cert. denied*, 465 U.S. 1041, 104 S. Ct. 1318, 79 L. Ed. 2d 714 (1984) (press challenge to order limiting scope of post-trial juror interviews); *In re The Express-News Corporation*, 695 F.2d 807 (5th Cir. 1982) (acknowledging press standing to challenge order limiting right to inter-

view jurors); *United States v. Antar*, 38 F. 3d 1348 (3d Cir. 1994) (same). Accordingly, the Court finds that Movants have standing to challenge the Court's June 27, 1997 order on First Amendment grounds and therefore grants Movants' motion to intervene. The Court now turns to the merits of Movants' First Amendment challenge.

B. Movants' Motion to Modify Order Restricting Juror Interviews

Movants rely heavily on two Fifth Circuit cases in challenging the Court's June 27, 1997 order: *In re The Express-News Corporation*, 695 F.2d 807 (5th Cir. 1982), and *United States v. Harrelson*, 713 F. 2d 1114 (5th Cir. 1983), *cert. denied*, 465 U.S. 1041, 104 S. Ct. 1318, 79 L. Ed. 2d 714 (1984). Movants read these two cases as imposing a cap on the restrictions that Courts may impose on juror interviews post-trial. Specifically, Movants contend that, after *Harrelson*, "to the extent [a] Court believes that some restrictions on juror interviews are necessary . . . to protect important interests, those restrictions must be limited to: a) a prohibition on repeated requests for interviews by each Movant once a juror . . . declines an interview request by that Movant; and b) a prohibition on inquiry into the specific vote of any juror other than the juror being interviewed." Memorandum in Support of Motion to Modify Order Restricting Juror Interviews at 8. The Court finds that Movants read *Express-News* and *Harrelson* too narrowly and that the Court's June 27 order is constitutional under the standards set forth in those cases.

In *In re Express-News Corporation*, 695 F.2d 807 (5th Cir. 1982), the Fifth Circuit vacated a restriction on post-verdict juror interviews, which was broader than the one at issue here. The rule in question provided that no person shall "interview . . . any juror, *relative, friend or associate thereof* . . . with respect to the deliberations *or verdict* of the jury in any action, except on leave of court

granted upon good cause shown." *In re Express-News Corporation*, 695 F.2d at 808 (quoting former Local Rule 500-2 of the Western District of Texas) (emphasis added). The Court found that the press had a limited first amendment right to gather news, which, under the proper circumstances could be outweighed by other compelling countervailing interests, such as the accused's sixth amendment right to a fair trial or the jurors' entitlement to privacy and protection against harassment. *Id.* at 810. The Court noted that, to be found constitutionally valid, an order restricting the journalistic right to gather news had to be "narrowly tailored to prevent a substantial threat to the administration of justice." *Id.* While the Court concluded that the rule promulgated by the district court failed to pass constitutional muster under that standard under the facts of that particular case,[3] it indicated that a properly tailored rule might be valid—for example, one that prevented the disclosure of "inappropriate" matters such as "the ballots of individual jurors or some other paramount value." *Id.* at 811.

United States v. Harrelson, 713 F. 2d 1114 (5th Cir. 1983), *cert. denied*, 465 U.S. 1041, 104 S. Ct. 1318, 79 L. Ed. 2d 714 (1984), involved an order that imposed four restrictions on proposed interviews with discharged jurors:

> 1. No juror has any obligation to speak to any person about this case, and may refuse all interviews or comment.
>
> 2. No person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed.
>
> 3. No interviewer may inquire into the specific vote of any juror other than the juror being interviewed.

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[3] Importantly, the Court found the district court's order unconstitutional *as applied* but did not find the order unconstitutional on its face.

> 4. No interview may take place until each juror in this case has received a copy of this order, mailed simultaneously with the entry of this order.

Harrelson, 713 F.2d at 1116.

The Fifth Circuit affirmed the order on appeal, emphasizing that the press has "no special, First Amendment right of access" to "[t]he particulars of jury deliberation." *Id.* at 1118. The Court found that inquiries into such details properly could be regarded as a substantial threat to the administration of justice because disclosures could have an adverse effect on freedom of speech *within the jury room*. Quoting Justice Cardozo, the Court observed that: "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Id.* (quoting *Clark v. United States*, 289 U.S. 1, 13, 53 S. Ct. 465, 468, 77 L. Ed. 993 (1933) (Cardozo, J.)). Moreover, the Court cited with approval the Fifth Circuit's decision in *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), *cert. denied sub nom, Miami Herald Publishing Company v. Krentzman*, 435 U.S. 968, 98 S. Ct. 1606, 56 L. Ed. 2d 59 (1978), in which the Court noted that there is a "[c]ompelling government interest in the integrity of jury deliberation[s] . . . [that] requires that the privacy of such deliberations and communications dealing with them be preserved." *Gurney*, 558 F.2d at 1210-11. In concluding that the press has no constitutional right of access to the written communications between judge and jury,[4] the *Gurney* Court noted that:

> Confidentiality is a shield against external considerations entering into the deliberative process. . . . Jurors must be permitted to deliberate fully and

[4] The Court notes that, although it was not required to do so under the decision in *Gurney*, the Court provided the press with access to written communications between the judge and the jury in this case when asked.

> freely, unhampered by the pressures and extraneous influences which could result from access by the press to the deliberating process.

Id. at 1211.

Finally, the *Harrelson* Court found that "jurors, even after completing their service, are entitled to privacy and to protection against harassment." *Harrelson*, 713 F.2d at 1116. In this vein, the Court took judicial notice "that reporters are persistent and tenacious in pursuing information and that they seek it regarding the nonpublic portions of legal proceedings . . . as well as the public ones." *Id.* at 1117. The Court noted that this was especially true in widely publicized or sensational cases. *Id.*

This Court finds that neither *In re Express News Corporation* nor *Harrelson* requires the modification of its order. After careful consideration of the principles underlying those cases, this Court concludes that the June 27, 1997 order issued in this case is "narrowly tailored to prevent a substantial threat to the administration of justice." *In re Express News Corporation*, 695 F.2d at 810.

The Court notes that its order does *not* prevent the press from interviewing jurors about this case at all. Nor does it cover the vote of an individual juror who consents to be interviewed. Rather, the order is narrowly tailored to apply only to jury deliberations. That there is a compelling governmental interest in maintaining the confidentiality of such deliberations is clear from the Fifth Circuit's decisions in both *Gurney* and *Harrelson*. *See Gurney*, 558 F.2d at 1211; *Harrelson*, 713 F.2d at 1116. This is the only way to guarantee that jurors are able to engage in free speech within the jury room.

Moreover, the Court did not enter this order willy-nilly, but was persuaded of its necessity based on the nature of this case. This was a long, contentious high-profile criminal case involving well-known defendants of power and influence. Indeed, the witnesses included an archbishop

and a former governor. Cases like this one do not even remotely resemble the everyday civil or criminal trial in terms of the stress and anxiety inflicted upon those asked to serve as jurors. In such cases, it is particularly important for jurors to be secure in the knowledge that the play-by-play of their thought processes during deliberations will not be in the newspaper once the trial is over, in order for them to deliberate frankly and honestly, without fear of later public embarrassment, harassment, or retaliation. One can understand that a juror would not want to be identified publicly by another juror as the one who persuaded others to vote for conviction or as one who made statements that he or she would never have made had the juror known they would be repeated in the press.

Moreover, it is insufficient to say that the Court's order should allow willing jurors to speak to the press about their own role in the deliberations. Because deliberations are a collaborative process, each juror's role in the deliberations is so inextricably intertwined with the role of the other jurors that such an order would be ineffective in protecting the compelling governmental interest in preserving the confidentiality of the deliberations.

Movants contend that the specific boundaries of what is meant by "jury deliberations" is unclear. The Court disagrees. *Black's Law Dictionary* defines "deliberation" in the context of jury function as the "analy[sis], discussi[on], and weighing [of] evidence" "within the secrecy of the jury room" "with a view to reaching a verdict based upon law applicable to [the] facts of [the] case as they find them to be." *Black's Law Dictionary* 427 (6th ed. 1990). Moreover, common sense dictates that "jury deliberations" cover the entire process by which jurors arrive at their verdict. This includes what was said and done by the jurors in the privacy of the jury room in the process of reaching the verdict in this case.

It is this Court's opinion that the specifics of such deliberations might be kept confidential in order to provide jurors with privacy and protection from harassment after trial and to ensure fair trials in the future by protecting free speech within the deliberation room. This Court believes that if the confidentiality of jury deliberations cannot be protected, there will not only be a chilling effect on the frankness of deliberations, but also that persons of probity and reserve may seek to avoid jury service altogether. The Court's order is narrowly tailored to protect these compelling interests.[5] *See generally, United States v. Antar,* 38 F.3d 1348, 1364 (3d Cir. 1994) (upholding provision prohibiting inquiry into the specific votes, statements, opinions, or other comments of any other juror in post-trial interviews); A. Goldstein, "Jury Secrecy and the Media: The Problem of Postverdict Interviews," 1993 *U. Ill. L. Rev.* 295, 314 (calling for a requirement that there be court authorization for the press to conduct post-trial jury interviews concerning the specifics of deliberations).

Indeed, it would be a breach of trust in this case to allow the specifics of jury deliberations to become public. This circuit's pattern jury charge concerning deliberations, which was given in this case, explicitly instructs jurors that: "Your deliberations will be secret. You will never have to explain your verdict to anyone." Fifth Circuit Pattern Jury Instructions—Criminal § 1.24 at 35 (1997). To allow the deliberations to become public even after the trial would make the Court's assurance of secrecy an illusory one.

Finally, the Court reemphasizes that jurors are free to decline any and all requests for interviews. *See In re*

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[5] The Court notes that the Uniform Local Rules in the Eastern, Middle, and Western Districts of Louisiana all provide, in pertinent part, that: "No juror who may consent to be interviewed shall disclose any information with respect to . . . [t]he deliberations of the jury." LR 47.5E (C)(2) and LR 47.5M & W (C)(2) (1997).

Express-News Corporation, 695 F.2d at 811 ("The jurors' freedom of speech is also freedom not to speak . . .").

Accordingly,

IT IS ORDERED that Movants' motion to intervene is hereby GRANTED.

IT IS FURTHER ORDERED that Movants' motion to modify the Court's June 27, 1997 order restricting juror interviews is hereby DENIED.

New Orleans, Louisiana, this 22nd day of July, 1997

/s/ Sarah S. Vance
SARAH S. VANCE
United States District Judge

APPENDIX C

[Excerpt of Transcript Containing Order Restricting Post-Trial Juror Interviews]

EXCERPT

THE COURT: I want to tell you how much I thank you, the court system thanks you and the citizens of this state thank you for the extraordinary job that you all have done as jurors in this case. As I said before, you've been away from your normal lives since the 12th of May. I know you all have families, I know some of you have small children, and it's just been extraordinary the dedication that you all have shown to this case. I just want you to know that without people like you the American system of justice simply would not work. I am extremely proud of you. I'm just so happy that I've gotten to know you in these last six weeks.

I now instruct you that you have no obligation to speak to any person about this case. I also instruct you that, absent a special order by me, no juror may be interviewed by anyone concerning the deliberations of the jury. I also instruct you that the lawyers and the parties are not to attempt to question you without an order from me.

I would now ask the marshals to please lead the jury out through this door. I want no one to leave the courtroom until the jury has left through this door.

THE DEPUTY CLERK: All rise for the jury, please.

(WHEREUPON, the jury was excused from the courtroom.)

* * * *

APPENDIX D

[Filed Aug. 4, 1997]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30756

UNITED STATES OF AMERICA,
Plaintiff

v.

CARL W. CLEVELAND, *et al.*,
Defendants

TIMES PICAYUNE PUBLISHING CORPORATION;
MICHAEL PERLSTEIN; CAPITAL CITY PRESS; JOE GYAN,
Intervenors-Appellants

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans

ORDER:

IT IS ORDERED that the motion of intervenors-appellants to expedite the appeal is granted.

IT IS FURTHER ORDERED that the motion of intervenors-appellants to file an appendix in support of their original brief is granted.

/s/ Henry A. Politz
HENRY A. POLITZ
Chief Judge

APPENDIX E

[Filed Nov. 25, 1997]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30756

UNITED STATES OF AMERICA,
Plaintiff

v.

CARL W. CLEVELAND, *et al.*,
Defendants

TIMES PICAYUNE PUBLISHING CORPORATION;
MICHAEL PERLSTEIN; CAPITAL CITY PRESS; JOE GYAN,
Intervenors-Appellants

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans

ON SUGGESTION FOR REHEARING EN BANC

Before GARWOOD, DUHE, and DEMOSS Circuit Judges.

PER CURIAM:

Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P and 5th Cir. R. 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. Demoss
United States Circuit Judge